

FLEISCHMAN AND WALSH, L. L. P.

ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION
1919 PENNSYLVANIA AVENUE, N. W.
SUITE 600
WASHINGTON, D. C. 20006
TEL (202) 939-7900 FAX (202) 745-0916
INTERNET www.fw-law.com

November 2, 2004

Via Electronic Mail

Mr. Christopher Libertelli
Chief Legal Advisor, Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Unbundled Access to Network Elements, WC Docket No. 04-313;
Review of Section 251 Unbundling Obligations of Incumbent Local
Exchange Carriers; CC Docket No. 01-338

Dear Mr. Libertelli:

On October 27, 2004, I met with you and Aaron Goldberger of the Wireline Competition Bureau on behalf of WorldNet Telecommunications, Inc. ("WorldNet") regarding the implications of the above referenced docket on competitors and competition in Puerto Rico. During this meeting you requested that I provide a short ex parte letter touching on two issues: 1) how the FCC can implement a regulatory "safety valve" to ensure that national UNE rules do not stifle the development of competition in Puerto Rico; and 2) the mechanics of a transition period for migrating from UNE switching to facilities-based switching. This letter responds to your request.

I. Regulatory Safety Valve

As we discussed, WorldNet believes that the facts in the record clearly demonstrate that the development of competitive market conditions in Puerto Rico is significantly behind the rest of the country. For this reason, WorldNet submits that Puerto Rico must be specifically excluded from any national finding of no impairment for UNE mass market switching. However, if the Commission believes that it cannot do this (and WorldNet believes it can and should) then the Commission must, at a minimum, create a regulatory mechanism that permits telecommunications markets such as Puerto Rico the opportunity to make granular, market-specific impairment showings, rather than being lumped in with the rest of country. Just as the *USTA II*¹ decision found that a nationwide presumption of impairment was unjustified, it would be equally inappropriate to simply presume the lack of impairment nationally, without a safety valve mechanism

¹ See 359 F.3d 554, 587 (D.C. Cir. 2004).

capable of accounting for unique circumstances that may exist in specific markets such as Puerto Rico.

Specifically, WorldNet believes that the Commission should create a process for mass-market switching and high capacity loops and transport similar to that which the D.C. Court of Appeals upheld in its *USTA II* decision with respect to enterprise switching. This process should include at least three components: 1) a clear process for the development of a state-level fact-finding proceeding within a specific timeframe, 2) a requirement that a state public utility commission file a recommendation with the Commission within a specific timeframe when it determines that facts developed in its fact-finding proceeding demonstrate that a UNE should be listed or delisted; and 3) reserves for the Commission ultimate authority to determine, within a specific timeframe, whether a UNE should be listed or delisted in that state.

In practice, under this proposed process either an ILEC or CLEC would be entitled to file a petition with a state commission requesting a fact-finding proceeding when they believe that conditions in a given market warrant the delisting or relisting of a specific UNE. The state commission would then hold a full evidentiary proceeding in which the parties are accorded full due process protections. Then, based upon the record in that proceeding, the state Commission would make a recommendation to the Commission when it finds that conditions warrant UNE delisting or relisting. The Commission itself would then examine the factual record to determine whether to delist or relist the UNE based upon the Board's recommendation. This approach preserves the ultimate decision making role for the Commission consistent with *USTA II* and helps preserve the Commission's scarce resources by relieving it of having to directly compile a record regarding facts as required under *USTA I* and *USTA II*. At the same time, this approach is in accord with the long-standing federal / state partnership that the FCC has consistently sought to foster.

In developing this process, it is critical that the Commission include specific timeframes for both state and Commission action. This will promote efficiency on the part of the parties and the regulatory authorities. It will also promote regulatory certainty by avoiding open-ended regulatory proceedings. With regard to the state level proceedings, the Commission should establish a one hundred and twenty (120) day timeframe from the date of the filing of a petition for a state commission to hold a fact-finding proceeding and issue a recommendation to the Commission. If the state Commission does not meet this timeframe, a party should be permitted to petition the Commission to review the UNE status directly. The Commission, in turn, should place the state commission recommendation on public notice, collect comments and reply comments on an expedited basis, and render its decision within forty-five (45) days from the date of submission by the state commission.

This shorter timeframe for Commission action is appropriate because the parties will already be familiar with the facts and issues contained in the state commission's filing and therefore will not require extended periods of time to comment. In addition,

the Commission will not have to compile a factual record for itself but need only review the record presented to it by the state commission and determine whether it meets the Commission's criteria for UNE listing or delisting (discussed below). Further, it is critical that the entire process be focused and efficient. The process set forth here lasts a total of 165 days. This should be more than enough time to compile a record and reach a decision on these matters, without being so open-ended as to unnecessarily increase regulatory uncertainty.

The Commission should also adopt standards and criteria to guide the state level review. The standards and criteria established by the Commission in the Triennial Review Order are appropriate for this purpose. When a state commission determines that conditions in a given market warrant the filing of a recommendation for delisting or relisting a network element, the Commission should require that any filing include findings of fact that support the recommendation, a summary of the process used to compile the record, and attach the portions of the record relied upon. This will ensure that the Commission has before it a full record containing all the relevant facts necessary to reach an informed decision.

As the Commission recognized in the Triennial Review Order, it should also create a process allowing it to directly review petitions where a state is unwilling or unable to fulfill a fact-finding role. The Commission should adopt a model similar to that contained in Section 252(e)(5) of the Act, where if the state commission does not act within a given timeframe, the Commission can review the matter directly. Similarly, the FCC should adopt a "certification" process similar to that established under Section 224(c) of the Act whereby the fact-finding function applies to those state commissions that certify their intent to follow the substantive and procedural guidelines established by the FCC. This will ensure that no state commission is forced to fulfill this function where it is unwilling or unable to do so. In such cases, parties could submit their UNE delisting / relisting petitions directly to the Commission. However, instead of waiting for the entire 120-day period (set forth above) permitted for state review to expire, the Commission should permit parties to apply to the Commission directly if the state commission has not acted within fifteen (15) calendar days of the filing of a petition. This will give the state commission ample time to either docket cases and begin proceedings, or expressly or impliedly refuse to conduct a proceeding. It will also serve the goal of streamlining this process and avoid essentially doubling the timeframe for resolution of these matters in those markets where a state commission declines to fulfill this fact-finding role.

Finally, the Commission should anticipate that there might be instances where market conditions in a particular state deteriorate after a UNE is delisted to the point that a state commission determines that relisting of a UNE is necessary. The Commission should make the process it adopts here flexible enough to address these situations. To this end, the Commission should permit review not only where competition flourishes and ILECs request that UNEs be delisted, but also where competition founders and a state commission determines that UNEs must be relisted. This process will help ensure

that the UNE rules are appropriate to meet local market conditions as required by *USTA I* and *USTA II*. Further, the existence of a predictable and focused relisting process will provide discipline in the marketplace and will help deter incumbent abuses of their monopoly power.

II. Transition Period

As we discussed in our meeting on October 27, it is critical that the Commission keep the status quo in place during any initial state-level proceeding. Otherwise, as WorldNet experienced in the enterprise switching proceeding, the ILEC will remove mass market UNE switching from CLECs at its earliest opportunity, even if it faces the likelihood of having to resume such offerings at the end of a regulatory proceeding. The disruption and uncertainty that this creates is lethal to competitive investment, planning and ultimately deployment. Further, WorldNet believes that the facts on the record in this proceeding clearly demonstrate that competitors in Puerto Rico are impaired without access to UNE switching. Accordingly, WorldNet believes that the most appropriate result here is for the Commission to determine that the status quo must remain in place for this brief period (no more than 165 days) to allow for individualized showings that specific UNEs must remain available in those markets where impairment remains.

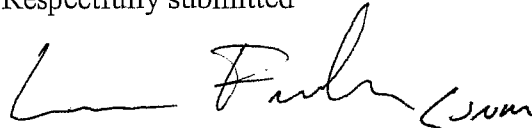
Where the Commission does determine that competitors are not impaired without access to UNE switching, WorldNet believes that a transition period permitting an orderly transition of customers from UNE switching to other alternatives is necessary. The 27-month transition timeframe set forth by the Commission in the Triennial Review Order, 47 C.F.R. §319(d)(2)(iv), is appropriate. However, this transition timeframe must be premised upon the demonstrated existence of a functioning and robust batch hot cut process by the ILEC in the relevant market. Specifically, the Commission should require that state commission create batch hot cut processes in accordance with the requirements established in the Triennial Review Order, 47 C.F.R. § 319(d)(ii). This process should also include a requirement that a state commission certify that the ILEC is in compliance with these requirements before the transition period begins to toll. Where the ILEC in a particular market has not demonstrated that it has a functioning batch hot cut process in place, the Commission's rules should hold the transition period in abeyance until compliance has been demonstrated. This is especially critical in areas such as Puerto Rico where the ILEC has never had to meet the market opening provisions of Section 271 of the Act.

III. Conclusion

The retention of a meaningful UNE-P option constitutes one of the most significant and critical issues to the maintenance and future development of telecommunications competition in Puerto Rico. WorldNet believes that the facts on the record in this proceeding clearly support a finding that competitors in Puerto Rico are impaired without access to UNE switching. However, WorldNet believes that a robust

“safety valve” process that permits both ILECs and CLECs to petition to have UNEs delisted and relisted is a viable way to ensure that the Commission’s UNE rules reflect the market conditions in Puerto Rico. However, in no event should this process start with the premise that mass market UNE switching is immediately delisted and that the Commission must issue an order relisting mass market UNE switching in the same manner as with enterprise market switching. This would have a catastrophic impact on competition in Puerto Rico and any other markets, however few they might be, where competitors continue to be impaired. For this reason, a transition period similar to that established in the Triennial Review Order is both necessary and appropriate. However, this transition period must only commence where an ILEC has demonstrated that it has a robust batch hot cut process in place in accordance with requirements established by a state commission.

Respectfully submitted

A handwritten signature in black ink, appearing to read "Lawrence R. Freedman", with a stylized flourish at the end.

Lawrence R. Freedman
Counsel for WorldNet Telecommunications,
Inc.

cc: Aaron Goldberger